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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 720

DALLAS ROLLINS,

Petitioner,

—v.—

THE PENNSYLVANIA RAILROAD COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

BRIEF FOR THE PENNSYLVANIA RAILROAD COMPANY IN OPPOSITION

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Opinions Below

Motions for a New Trial by each of the parties were denied in a letter opinion of Honorable David A. Pindar, *J. S. C.* (Pet. App. A)[1] which is not reported. The opinion of the Superior Court of New Jersey, Appellate Division (Pet. App. B) is not reported. The Supreme Court of New Jersey denied a Petition for Certification (Pet. App. C), without opinion.

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[1] "Pet. App." refers to the appendix to the petition for certiorari.

Jurisdiction

The order denying the petition for certification was executed on October 4, 1965. The petition for certiorari was filed on November 4, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3).

Questions Presented

1. Whether the decision and rulings in the courts below properly applied the doctrine of comparative negligence.

2. Whether the trial court properly denied request to charge violation of the Boiler Inspection Act where (a) the alleged violation was never raised as an issue until the conclusion of the trial and (b) the violation charged was lack of proper toilet facilities on a locomotive.

Statutes Involved

45 United States Code, Section 23 and Section 53 which are set forth at pages 3 and 4 in the petition.

Statement

Plaintiff, a head-end brakeman, was injured when he tried to jump from a moving train at the east end of the Enola Yard before his work was completed, in violation of railroad regulations (D12a-8; D11a-25, 39; D74a-17).[2]

[2] "D" refers to the appendix to defendant-appellant's brief in the Superior Court of New Jersey.

His job required him to remain on the head-end of the train until the locomotive arrived at the west end of Enola Yard (D7a-30).

Plaintiff had performed this job about 100 times before the date of the accident and was familiar with the stops and setoffs (D25a-40; D26a-5).

Plaintiff, alleging the toilet on the locomotive was unsanitary, claims that he jumped from the train in order to use toilet facilities about 100 yards from the location of his fall because he had had an urge to use a toilet since stopping at Morrisville (D11a-24; D9a-13). Between Morrisville and the point where plaintiff jumped, the train stopped at Ernest for approximately 25 minutes (D25a-14) and at Thorndale, Lancaster and Cly Tower for an average of 10 to 15 minutes each (D56a-10). There were toilet facilities at each of the stops, yet plaintiff never requested the engineer to hold the train so that he could relieve himself (D9a-33; D10a-17; D83a-15). The enginemen and the other members of the crew denied that plaintiff told them he was going to get off the train (D57a-24; D83a-30).

The jury returned special verdicts wherein they found:

> 1. the defendant was negligent; 2. the plaintiff was negligent; 3. the plaintiff's negligence proximately contributed 62½ per cent to the happening of the accident; 4. plaintiff's damages, disregarding comparative negligence, were $200,000; 5. subtracting $125,000, due to plaintiff's negligence, he should be awarded $75,000 (D284a-D286a).

Argument

1. Petitioner's contention, rejected by the courts below, alleging error in the instructions to the jury, is completely unfounded. A review of the entire instruction concerning diminution of damages (D267a-28 to D268a-24), and set forth at length in the brief of Respondent, filed with the Supreme Court of New Jersey, so clearly demonstrates the lack of merit in this argument that we will not belabor the point here.

The further contention, that there was insufficient evidence of any fault in plaintiff's conduct to permit a jury to find him guilty of negligence which was a proximate cause of his injury, is also refuted at length by references to the record in the same brief. Again we assume it need not be repeated here.

2. The second reason presented for allowance of the writ, is equally unfounded.

Although a violation of the Boiler Inspection Act was never properly raised by the pleadings nor presented in the trial in order that a jury might pass upon it, we think this court should nevertheless, reject petitioner's assertion that the facts would require submission of the question to a jury, if it had been properly pleaded and if sufficient testimony concerning a violation had been presented. The record demonstrates that a violation of the Safety Appliance Act and/or the Boiler Inspection Act was never mentioned prior to or during the actual trial. They were first mentioned, when plaintiff's attorney responded to defendant's motion for judgment, on the day

after the final witnesses in the case were presented and had been dismissed (D216a-9).

Petitioner contends a toilet is one of the "parts and appurtenances" Congress intended to be included under the Boiler Inspection Act, 45 U. S. C. §23. The Act does not specify the various "parts and appurtenances" intended. It does however authorize the Interstate Commerce Commission to establish standards for safety equipment, *United States* v. *Baltimore & Ohio R.R. Co.*, 293 U. S. 454 (1935). The Commission does not require toilets to be installed on locomotives, nor has any court ruled that they are required under the Act for the obvious reason that a toilet certainly is not an essential part of a locomotive.

The New Jersey courts based their rulings and decisions upon the holding of this court in *Southern Railway Co.* v. *Lunsford,* 297 U. S. 398 (1936), where it was held unessential devices which do not add to the peril are not within the coverage of the Act. The court said, at page 402:

> "With reason, it cannot be said that Congress intended that every gadget placed upon a locomotive by a carrier, for experimental purposes, should become part thereof within the rule of absolute liability. So to hold would hinder commendable efforts to better conditions and tend to defeat the evident purpose —avoidance of unnecessary peril to life or limb. Whatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission, are within the statute. But mere experimental devices which do not increase the peril, but may prove helpful in an emergency, are not."

Toilets are not an essential part of a locomotive. Locomotives can and are safely operated without toilets. Although the toilet would not be termed an "experimental" device, it is a superfluous piece of equipment, the presence of which did not increase the peril to life or limb, and it would appear that the definition and rationale, of *Southern Railway Co.* v. *Lunsford, supra,* would exclude this item. The defendant had no obligation under the Act to supply toilets. If there were no toilets on the train, the plaintiff would have had the same problem. There was no statutory duty to supply toilets. Therefore, it is not a violation of a statutory duty if the defendant supplied improper toilets where the injury did not occur from their use.

The cases cited by petitioner, *Napier* v. *Atlantic Coast Line R. Co.,* 272 U. S. 605 (1926); *Urie* v. *Thompson,* 337 U. S. 163 (1949) and *Lilly* v. *Grand Trunk Western R. Co.,* 317 U. S. 481 (1943), involve either equipment required to prevent direct injury such as automatic fire doors, cab curtains, and proper sanders, or dangerous objects and foreign matter which, in themselves, directly cause injury. These cases are clearly distinguishable from the instant one.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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